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ALEXANDER L. STEVAS,
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81-2229

No.

In the Supreme Court of the United States

~~May~~ OCTOBER Term, 1981

MARIO B. CHIAFARI

Petitioner

v.

U.S. Department of the Interior ~~Et~~ Al

Respondent

APPENDIX TO PETITION

MARIO B. CHIAFARI
7912 Redstone Road
Kingsville, MD 21087
(301) 592-6785

A1

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MARIO B. CHIAFARI

v.

DEPARTMENT OF THE INTERIOR

OPINION AND ORDER

Appellant, Mario B. Chiafari, was a Civil Engineer with the National Park Service. He was removed, effective June 19, 1980, based on charges of inefficiency and continued inadequate work performance, insubordination and failure to follow instructions of his superiors. He filed a timely appeal of this decision with the Board's Washington, D.C. Field Office. A hearing was held at appellant's request. The presiding official sustained the removal in his initial decision dated October 10, 1980, finding that the agency had proved the majority of its charges by a preponderance of the evidence and appellant's removal was for such cause as would promote the efficiency of the service.

Appellant filed a timely petition for review in which he alleged that the presiding official erroneously interpreted the evidence presented. Attached to the petition were numerous documents. Some of these documents were already in the record and some were presented to the Board for the first time as attachments to the petition for review. All of the documents, however, were in existence prior to the closing of the record by the presiding official.

The Board has previously held that the failure of a party to present evidence prior to the close of the record will preclude it from doing so by way of a petition for review under 5 C.F.R. 1201.115(a) unless there is a showing that, even with due diligence, the evidence was unavailable prior to the closing of the record. **Szczerbiak v. United States Postal Service**, MSPB Order No. CHO75299071 (August 19, 1980); **Beer v. Department of the Army**, 2 MSPB 226 (1980). Appellant has not attempted to show why this evidence could not have been introduced prior to the close of the record. The "new" documentary evidence

submitted by appellant as attachments to his petition for review, therefore, does not constitute new and material evidence which, despite due diligence, was not available prior to the close of the record.

Additionally, appellant did not assert, in his petition for review, that the presiding official improperly applied the requisite standard of proof to the agency's evidence presented in support of its action. Rather, appellant's entire petition for review constitutes nothing more than disagreement with the findings of fact, interpretation of the evidence and credibility determinations of the presiding official. Such interpretations and findings by a presiding official are entitled to deference by the Board since the presiding official has observed the demeanor and has heard the testimony of the witnesses. **Weaver v. Department of the Army**, 2 MSPB 297 (1980). The Board finds no basis that would warrant reversal of the presiding official's determinations.

The Board, having fully considered appellant's petition for review of the initial decision and finding

that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

May 13, 1981
Date
Washington, D. C.

Robert E. Taylor
Secretary

Note: Additional evidence was submitted in opposition to the Presiding Officials sustained charges, dated November 11, 1980, was available to my Hearing Attorney
Contents: Four pages of arguments and thirty-two copies of supporting (mostly new) documents.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1553

Mario Chiafari,

Petitioner,

v.

Department of the Interior and
Merit Systems Protection Board,

Respondents.

On Petition for Review from
the Merit Systems Protection Board.

Argued: January 8, 1982

Decided: February 4, 1982

Before RUSSELL, HALL and MURNAGHAN,
Circuit Judges.

Peter Max Zimmerman for Petitioner; Ross W. Dembling, Office of the Solicitor, United States Department of the Interior for Respondent.

PER CURIAM:

Mario P. Chiafari was fired from his position with the National Park Service for inefficiency and insubordination. After the dismissal was upheld by the Merit Systems Protection Board, Chiafari appealed to this Court pursuant to 5 U.S.C. S7703.

On appeal Chiafari argues that the evidence insufficiently linked his misconduct to the efficiency of the Service, and the sanction of dismissal was both disproportionate to his transgressions and inappropriate in light of the evidence. Our review of the record convinces us that Chiafari's well-documented intransigence had a significant impact upon the Service's efficiency, and that these factors amply justify his dismissal.

Accordingly, the decision of the Merit Systems Protection Board is affirmed.

AFFIRMED.